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16
17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

19 CHASOM BROWN, *et al.*, individually and
20 on behalf of all similarly situated,

21 Plaintiffs,

22 v.

23 GOOGLE LLC,
24 Defendant.

Case No. 5:20-cv-03664-LHK-SVK

**GOOGLE LLC'S MOTION FOR RELIEF
FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE RE:
APEX DEPOSITION OF SUNDAR
PICHAI**

CIVIL L.R. 72-2

Judge: Hon. Lucy H. Koh

1 **I. INTRODUCTION**

2 Sundar Pichai is Google’s top executive officer and CEO of its parent company, Alphabet,
 3 Inc., which employs over 150,000 people across all of its subsidiaries. Plaintiffs prematurely seek to
 4 depose Mr. Pichai despite having completed only eight of their allotted 20 depositions. In a single-
 5 sentence Order that fails to acknowledge the apex doctrine’s exacting standard or explain whether
 6 Plaintiffs have complied with it, the Magistrate Judge granted Plaintiffs’ request. The Magistrate
 7 Judge acknowledged that “[m]any of [Plaintiffs’] cited documents … do not appear to bear any
 8 connection to Mr. Pichai,” but nevertheless ordered a deposition because, “[a] few documents
 9 establish that specific relevant information was communicated to, and possibly from, Mr.
 10 Pichai.” Dkt. 365 at 2. Respectfully, that is not the test for an apex deposition. The Order should be
 11 reversed.

12 A party seeking to depose a high-level executive must show that the potential deponent has
 13 “unique first-hand” relevant knowledge. *Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263
 14 (N.D. Cal. 2012) (quotation omitted). Courts preclude such discovery where it “can be obtained from
 15 [a] source that is more convenient, less burdensome, or less expensive,” and “the closer that a
 16 proposed witness is to the apex of some particular peak in the corporate mountain range … the more
 17 appropriate the protections of the apex doctrine become.” *Id.* (quotation omitted). Simply showing
 18 that lower-level employees “communicated to” Google’s top executive (even about potentially
 19 relevant information) does not establish he has “unique” knowledge. By their very nature, lower-level
 20 employees’ communications with Mr. Pichai are not uniquely within Mr. Pichai’s knowledge. Nor
 21 have Plaintiffs exhausted other, less intrusive means of seeking this discovery. There is no rush to
 22 leap-frog other potential deponents, as Plaintiffs have a majority of their depositions still to take, and
 23 the Court recently extended the close of fact discovery until March 4, 2022. Dkt. 377.

24 The apex discovery doctrine is designed to keep in check depositions that “create[] a
 25 tremendous potential for abuse or harassment.” *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL
 26 205067, at *3 (N.D. Cal. Jan. 25, 2007). Plaintiffs should be required to satisfy the governing legal
 27 standard by showing Mr. Pichai has unique, first-hand knowledge, after they have exhausted

1 depositions of lower-level employees—including, at minimum, depositions of the employees who were
 2 parties to the communications in the “few documents” underpinning the Order.

3 **II. STANDARD OF REVIEW**

4 Magistrate Judges’ rulings on non-dispositive motions may be set aside or modified by the
 5 district court if found to be “clearly erroneous” or “contrary to law.” Fed. R. Civ. P. 72(a); *see also* 28
 6 U.S.C. § 636(b)(1)(A). “A ruling is clearly erroneous if the reviewing court, after considering the
 7 evidence, is left with the ‘definite and firm conviction that a mistake has been committed’” and “[a]
 8 decision is contrary to law if the magistrate judge fails to apply or misapplies relevant case law,
 9 statutes, or rules of procedure.” *Kelley v. AW Distrib., Inc.*, 2021 WL 5414322, at *1 (N.D. Cal. Sept.
 10 3, 2021). “A decision is [also] ‘contrary to law’ if it … fails to consider an element of the applicable
 11 standard.” *Forouhar v. Asa*, 2011 WL 4080862, at *1 (N.D. Cal. Sept. 13, 2011).

12 **III. ARGUMENT**

13 The Court’s single-sentence rationale fails to properly apply the well-established standard for
 14 assessing the propriety of deposing “apex” executives, and ignores controlling authorities. Dkt.
 15 365. Under that standard, courts deny efforts to depose senior executives where the seeking party has
 16 not established the executive has unique knowledge that is not obtainable via written discovery or
 17 other witnesses. *Affinity Labs of Texas v. Apple, Inc.*, 2011 WL 1753982, at *15 (N.D. Cal. May 9,
 18 2011). The court should have denied Plaintiffs’ request here.

19 1. Plaintiffs Failed to Show That Mr. Pichai Has “Unique First-Hand, Non-Repetitive
 20 Knowledge” of Facts Relevant to This Litigation

21 Although Google has produced more than six million pages of documents in this action,
 22 including ESI from Mr. Pichai’s own custodial files, Plaintiffs have been able to point to only a
 23 handful of documents in support of their deposition request. Even within this small universe of
 24 cherry-picked documents, many “do not appear to bear any connection to Mr. Pichai,” as the Court
 25 acknowledged. Dkt. 365 at 2.

26 What remains is insufficient to find that Mr. Pichai has “unique first-hand, non-repetitive
 27 knowledge” as required to order his deposition. *Affinity Labs*, 2011 WL 1753982, at *15. The court
 28 stated that “[a] few documents establish that specific relevant information was *communicated to, and*

1 **possibly from**, Mr. Pichai. *See, e.g.*, GOOG-BRWN-00048967.C; GOOG-CABR-05269678.” Dkt.
 2 365 at 2 (emphasis added). But such communications do not satisfy the apex doctrine. By their very
 3 nature, communications between Mr. Pichai and others are not uniquely within Mr. Pichai’s
 4 knowledge. Moreover, the Court’s Order does not actually identify any communications **from** Mr.
 5 Pichai—stating only that Plaintiffs’ documents show this was “possibl[e].” Dkt. 365 at 2. Plaintiffs’
 6 speculation alone regarding Mr. Pichai’s knowledge cannot justify the deposition of Google’s highest
 7 executive officer. *See, e.g.*, *Celerity, Inc.*, 2007 WL 205067, at *1 (granting protective order because
 8 “the Court determines that there is no indication that either [apex deponent] possess[es] the requisite
 9 firsthand and nonrepetitive knowledge to justify their depositions”).

10 Although the Court’s Order states that its “citation to certain documents is for exemplary
 11 purposes only and is not exhaustive,” *see* Dkt. 365 n.2, the two documents cited in the Order are
 12 exemplary only of information being provided to Mr. Pichai from lower-level employees. That
 13 demonstrates Mr. Pichai’s **lack** of unique knowledge. The first document, GOOG-BRWN-
 14 00048967.C, is a “Comms” document provided to Mr. Pichai with talking points concerning the
 15 development of Incognito mode for the Maps application (an application not at issue in this
 16 lawsuit). The document contains only high-level information regarding the desired messaging
 17 strategy and there is no indication Mr. Pichai drafted or provided input. The second document,
 18 GOOG-CABR-05269678, is a 2019 slide deck in which lower-level employees updated Mr. Pichai
 19 regarding ongoing projects with the Chrome Browser. Indeed, the very first page explains: “Sundar
 20 wanted to get an update about what Chrome Browser was doing, planning, and thinking about related
 21 to privacy and user trust. This is the deck that Anil, Darin, Margret, Alex, and Parisa used to
 22 present.”

23 Simply put, Plaintiffs’ best evidence to meet their apex burden consists of one-way
 24 communications in which Mr. Pichai was updated by lower-level employees about issues relevant to
 25 Chrome and privacy. But this demonstrates Mr. Pichai’s knowledge is **not** unique, and shows the
 26 unsurprising fact that, as CEO, he was kept generally abreast of his company’s products and
 27 services. *See, e.g.*, *Celerity, Inc.*, 2007 WL 205067, at *3 (apex discovery improper “[w]here a high-

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1 level decision maker [is] removed from the daily subjects of the litigation [and] has no unique
 2 personal knowledge of the facts at issue.” (quotation omitted)).

3 2. Plaintiffs Also Failed To Show They Have Exhausted Efforts to Obtain This Discovery
 4 Through Less Intrusive Methods

5 An alternative but equally sufficient grounds for reversal is the Order’s failure to consider
 6 whether Plaintiffs exhausted less intrusive methods of obtaining the information they seek, which is a
 7 prerequisite to an apex deposition. *Mehmet v. PayPal, Inc.*, 2009 WL 921637, at *2 (N.D. Cal. Apr. 3,
 8 2009) (“Courts generally refuse to allow the immediate deposition of high-level executives, the so-
 9 called ‘apex deponents,’ before the depositions of lower level employees with more intimate
 10 knowledge”); *Icon-IP Pty Ltd v. Specialized Bicycle Components, Inc.*, 2014 WL 5387936, at *2
 11 (N.D. Cal. Oct. 21, 2014) (denying apex deposition “because [the seeking party] has failed to meet the
 12 second prong of this conjunctive test,” including through “interrogatories and depositions of lower-
 13 level employees.”).

14 Even assuming communications occurred between Mr. Pichai and lower-level employees
 15 regarding issues relevant to this lawsuit, the Order’s citation shows that Plaintiffs have not even
 16 attempted to exhaust discovery surrounding any such communications. The presentation in GOOG-
 17 CABR-05269678, for instance, explains that it was drafted with input from at least five lower-level
 18 employees, some of whom Plaintiffs have designated as document custodians but not one of whom
 19 Plaintiffs have deposed. Quite the opposite: Plaintiffs rushed to seek Mr. Pichai’s deposition after
 20 taking only eight of their allotted 20 depositions, and just last month, served Google with three notices
 21 for Rule 30(b)(6) depositions that have not yet occurred. Courts routinely grant protective orders
 22 barring depositions of senior executives prior to Rule 30(b)(6) depositions. *See, e.g., Anderson v. Cty.*
 23 *of Contra Costa*, 2017 WL 930315, at *4 (N.D. Cal. Mar. 9, 2017) (denying apex deposition and
 24 ordering plaintiffs to first “depose a Rule 30(b)(6) witness” on the relevant topics then “meet and
 25 confer . . . about the necessity and scope of [the apex] deposition”); *Stelor Prods., Inc. v. Google, Inc.*,
 26 2008 WL 4218107, at *4 (S.D. Fla. Sept. 15, 2008) (denying depositions of Google founders Sergey
 27 Brin and Larry Page since the same information may be “obtainable through [the deposition] of a
 28 designated spokesperson” (citation omitted)). Here, the Order’s single-sentence reasoning did not

1 consider whether Plaintiffs' exhausted *any* less intrusive discovery method, which is a required
 2 element of the doctrine. *Icon-IP Pt.*, 2014 WL 5387936, at *2.

3. Ordering Mr. Pichai's Deposition to Proceed Against This Factual and Legal Backdrop
 Was Contrary to Controlling Law and Clearly Erroneous

The Order failed to properly apply the apex discovery doctrine adopted by California and
 federal law, which is a *per se* abuse of discretion: "It amounts to an abuse of discretion to withhold a
 protective order when a plaintiff seeks to depose a[n] ... officer at the apex of the corporate hierarchy,
 absent a reasonable indication of the[ir] personal knowledge ... and absent exhaustion of less intrusive
 discovery methods." *Liberty Mutual v. Superior Court of San Mateo*, 10 Cal. App. 4th 1282, 1286
 (1992). The Order is based solely on information "communicated" between lower-level employees
 and Mr. Pichai. That, of course, cannot be information unique to Mr. Pichai, and the Order fails to
 consider whether Plaintiffs exhausted other methods for obtaining the discovery they seek, such as
 depositions of employees party to those communications. At minimum, a protective order is
 appropriate until Plaintiffs have explored the myriad discovery methods available to them in lieu of
 deposing Mr. Pichai, such as the double-digit number of depositions that have already been granted by
 the Court but have not yet been taken. *Accord Icon-IP Pt.*, 2014 WL 5387936, at *2 (denying request
 for apex deposition "without prejudice to ... seeking t[he] depos[ition] ... at a later time should less
 intrusive discovery methods prove unsuccessful"); *Groupion, LLC v. Groupon, Inc.*, 2012 WL
 359699, at *4 (N.D. Cal. Feb. 2, 2012) (denying request for apex deposition noting the seeking party
 "has not shown that it even attempted less intrusive means of discovery, such as interrogatories or
 depositions of lower-ranking employees"); *Celerity*, 2007 WL 205067, at *3-5 (denying
 apex deposition request, and ordering the seeking party to "make a good faith effort to extract the
 information it seeks from interrogatories and depositions of lower-level ... employees").

IV. CONCLUSION

For the reasons set forth above, Google respectfully requests that this Court set aside the
 Court's December 27, 2021 Order (Dkt. 365) granting Plaintiffs' request to depose Mr. Pichai, and
 grant Google's request to prevent the deposition of Google's Chief Executive Officer.

1 DATED: January 10, 2022

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CERTIFICATE OF SERVICE

I, Andrew H. Schapiro, hereby certify that on January 10, 2022, I electronically filed the foregoing document with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which will send electronic notification to all counsel of record.

Dated: January 10, 2022